

## THE SUTHERLAND REPORT:

### A MISSED OPPORTUNITY FOR GENUINE DEBATE ON TRADE, GLOBALIZATION AND REFORMING THE WTO

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Proponents of high-level panels generally invoke two reasons in favor of the exercise. First, in the face of political deadlock, a daring yet objective analysis by high-profile experts may create momentum for reform and unlock the political stalemate. Second, periodic review by unbiased, yet knowledgeable outsiders may sharpen the effectiveness of an organization and move it beyond the short-term perspective of those engrained in the system. Although only time can tell, the odds that the Sutherland report will meet either of these objectives are low. The report is neither experts rocking the politically stuck boat,<sup>1</sup> nor outsiders blowing new life into the WTO.

Although the Sutherland report offers a truly thoughtful and interesting analysis, it is largely a defense of the *status quo* by WTO insiders.<sup>2</sup> The report nibbles around the edges of the WTO's foundational problems – such as the discontents of globalization, the lack of coherence between liberalization and the provision of public goods and the imbalance between the WTO's automatic judiciary and its deadlocked political branch – only to fixate, eventually, on typically insider concerns and solutions (such as regional trade agreements, observership status in WTO meetings, increasing the role and budget of the WTO Secretariat and the creation of a senior officials' consultative body to smooth the WTO political process and an expert group reviewing specific dispute findings to rein-in the WTO's judicial branch). The overall message of the report is an unabated defense of the WTO largely unchanged<sup>3</sup> and, for the most part, to be kept safely secluded from other international

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<sup>1</sup> Although the WTO Director General, in a *Foreword* to the report (at p 2), sets out the ambitious mission of examining 'the functioning of the institution – the WTO – and to consider how well equipped it is to carry the weight of future responsibilities and demands', in his *Preface*, Peter Sutherland (at p 5) quickly tempered those high hopes when stating that the Consultative Board 'tried to propose realizable reforms rather than more substantial changes that could not, in our view, have commanded the degree of support necessary for them to be effected'.

<sup>2</sup> All eight members of the Consultative Board come from within the relatively closed circle of trade and international economics: four academics, three (trade) diplomats and one businessperson. The Board did not include any representative from civil society nor any known critic of the system.

<sup>3</sup> An important exception is the report's call for more transparency and public meetings including those in WTO dispute settlement (see Chapters V and VI). Yet, this is hardly a novel call but one that has been made and spearheaded in particular by the United States for quite some time.

efforts to correct market failures and accompany free trade with social and other non-economic safety nets.<sup>4</sup>

In sum, considering the problems analyzed (insiders analyzing insider problems), the solutions proposed (insiders largely defending the *status quo*) and the secluded way in which the report was produced (no external consultation<sup>5</sup>), the Sutherland report seems destined to be regarded by history as a missed opportunity. The report's eloquent defense of multilateral trade liberalization will, at best, embolden those that already supported the WTO (which includes the present author). At worst, the report risks further alienating the critics of the world trade system and globalization more generally with statements such as 'the advantages that the WTO can endow on chronically poor countries is limited' (p 17) and 'the creation and interpretation of WTO rules should be preserved from undue external interference' (p 79).

This article first addresses two specific foundational problems skirted in the Sutherland report: (i) the WTO's protectionist/producer bias and (ii) the question of coordination and coherence with other international organizations (Sections I and II). The article then offers an alternative diagnosis of the world trade system (Section III) and suggests a novel paradigm to assess WTO reform proposals (Section IV). Finally, some of the proposals in the Sutherland report are examined in light of this novel paradigm (Section V).

#### I. THE DARK SIDE OF THE WTO: INHERENT PROTECTIONISM AND PRODUCER RATHER THAN CONSUMER/CITIZEN WELFARE

The Sutherland report follows the, by now, familiar template of the defenders of globalization (to which, I might add, the present author belongs). In essence, liberalized trade increases economic efficiency. Although it creates some losers, eventually, the rising tide lifts all boats and overall welfare is increased. Yet, in apparently seamless fashion, as happens so often, the report then equates the WTO with liberal trade. The reality, however, is that the

<sup>4</sup> The report calls for more coherence and coordination with other intergovernmental organizations (see Chapter IV) but essentially limits such call to the World Bank and IMF, and even there portrays the WTO as the controlling and prevailing legal regime. See, for example, at p 38: 'conditionalities imposed by the IMF and World Bank should not only be supportive but consistent with WTO obligations – since they are not excluded from challenge under the Dispute Settlement Understanding'. That the national implementation of such conditionalities can be challenged before a WTO panel is correct. However, if one takes coordination and coherence between the WTO and the IMF/World Bank seriously, one cannot simply require that WTO rules always and in each case prevail over such conditionalities.

<sup>5</sup> The Consultative Body met a total of three times without any external consultation and completed its work in eighteen months. Contrast this to the UN High-level Panel on Threats, Challenges and Change that issued its report in December 2004 after 40 regional consultations and issue workshops and six additional meetings (entitled *A More Secure World: Our Shared Responsibility*, available at <http://www.un.org/secureworld>). Notwithstanding this extensive outreach, the UN report was completed in just one year and includes ambitious proposals on reforming the UN Security Council and the rules on the use of force.

WTO is as much about protectionism as it is about free trade. As one commentator observed:

Global economic rules are not written by Platonic rulers, or their present-day pretenders, academic economists. If WTO agreements were truly about 'free trade,' as their opponents like to point out, a single sentence would suffice ('there shall be free trade').<sup>6</sup>

For historical reasons, many of which the developing world itself is to blame for, the system is seriously skewed in favor of the rich and powerful. Whenever developing countries have a chance of winning the free trade game, the sector was either carved out (textiles, agriculture) or so-called fair trade remedies (anti-dumping, safeguards) were ushered in.

Moreover, rather than focused on consumer or citizen welfare, the trade system is heavily tilted in favor of producers and exporters. The very premise of the institution is to bring producer-exporters together internationally so as to avoid the protectionist tendencies of the masses at home. The underlying assumption is, in other words, that producers or companies always act in the majority interest (i.e. eventually increase consumer welfare and hence can be trusted) whilst democratic politics necessarily ends up in log-rolling and protectionism (i.e. harms overall welfare and hence must be tied to the mast of WTO disciplines).

Yet again, the reality is, however, that there is as much politics at the WTO, with special interest groups clamoring for favors, as there is in domestic parliaments. Protectionist agreements such as those concerning agriculture, textiles, or anti-dumping, and agreements that favor one group of countries over another (such as TRIPS<sup>7</sup>), illustrate that the WTO does not necessarily lead to free trade in favor of the majority, but represents a political deal brokered in the context of power and special interests. This is not inherently a bad thing as politics, both at the domestic and international level, will and must always play a predominant role. However, to limit this political bargaining game at the WTO to producer interests – on the ground that they are a proxy of majority welfare<sup>8</sup> and democratic politics unavoidably ends up in protectionism – is effectively elevating one set of special interests above all others.<sup>9</sup> Equally, to isolate the WTO from non-trade concerns puts one societal

<sup>6</sup> Dani Rodrik, *Feasible Globalizations* (Nat'l Bureau of Econ. Research, Working Paper No. W9129, 2002) at 18.

<sup>7</sup> See, Laurence Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking', 29 *Yale J. Int'l* (2004) 1.

<sup>8</sup> See John O. McGinnis and Mark L. Movsesian, 'World Trade Constitution', 114 *Harv. L. Rev.* (2000) 511.

<sup>9</sup> See Eyal Benvenisti, 'Exit and Voice in the Age of Globalization', 98 *Mich L. Rev.* 167 (1999) and Robert Keohane and Joseph Nye, 'The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy', in Roger B. Porter *et al.* (eds), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium* (2001) 10.

concern (economic welfare) above all others (e.g. citizen concerns over poverty, social welfare or the environment).

To this date, the world trade system remains focused primarily on non-discrimination (not economic efficiency) and the protection of producer (not consumer) welfare.<sup>10</sup> No matter how inefficient a regulation or trade policy is (i.e. irrespective of consumer welfare) GATT permits it as long as it is (inefficiently) applied across the board to everyone (including foreign traders). From this perspective, the system neither avoids harmful cross-border externalities nor does it inherently protect domestic consumers. Both in the rules and exceptions that it sets up (equal competitive opportunities, rather than efficient regulation; major carve-outs for textiles and agriculture) and the escape clauses it provides for (anti-dumping, countervailing duties and safeguards triggered each time by injury to domestic *producers*, not harm to *consumers*), the system was created and continues to operate at the behest of producers. It is wed as much to liberal trade as protecting existing producers.

In addition, it is no longer obvious that gains from trade necessarily translate into lower prices for consumers and more or better employment.<sup>11</sup> Often-times the benefits of market access stick predominantly to the hands of producers, shareholders and traders with limited trickle down effect for consumers (in terms of lower prices) or workers (in terms of higher wages or better social benefits<sup>12</sup>). In this context, to equate producer gains with majority welfare interests can become strenuous. As the IMF's Managing Director, Horst Kohler, conceded, 'the disparities between the world's richest and poorest nations are wider than ever'.<sup>13</sup> Also *within* countries that have overall benefited tremendously from globalization, such as the United States and China, market forces alone have only widened the gap between rich and poor.

Indeed, even to the extent that liberalized trade does reduce consumer prices, consumers are increasingly not just concerned or interested in lower prices but also operate and make market decisions as citizens and workers.<sup>14</sup> And in our capacity of citizens and workers we also desire social goods, be it

<sup>10</sup> See Patrick Messerlin, 'Non-Discrimination, Welfare Balances and WTO Rules: A Historical Perspective', and Petros Mavroidis, 'Come Together? Producer Welfare, Consumer Welfare and WTO Rules', in E.-U. Petersmann (ed), *Preparing the Doha Development Round: Challenges to the Legitimacy and Efficiency of the World Trading System* (2003) respectively at 154 and 137.

<sup>11</sup> See, for example, William Lakin, 'EU Textile Quotas Benefit Consumers', *Financial Times*, 4 March 2005 (providing figures that indicate that dropping quotas on textiles actually increased consumer prices).

<sup>12</sup> See Robert Reich, 'Don't Blame Wal-Mart', *New York Times*, 28 February 2005 (in the United States, in 2004, 'the real wages of hourly workers, who make up about 80 percent of the work force, actually dropped for the first time in more than a decade; hourly workers' health and pension benefits are in free fall').

<sup>13</sup> *Working for a Better Globalization*, Remarks by Horst Kohler at the Conference on Humanizing the Global Economy, Washington DC, 28 January 2002.

<sup>14</sup> See Douglas Kysar, 'Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice Preferences for Processes', 118 *Harvard Law Review* (2004) 525.

the absence of abject poverty, a healthy environment or adequate health benefits and labor standards. Liberalized market forces cannot adequately ensure the provision of those social public goods. It requires government intervention.<sup>15</sup> Yet, is it not ironic that in an age of continuous economic expansion, social safety nets are gradually eroding (rather than expanding) and governments find it increasingly difficult to provide those public goods? Is John Ruggie right when he says that

global market integration induces governments to pursue greater fiscal austerity, ease regulatory and tax burdens on business, and strongly discourage certain policy options if not ruling them out altogether – owing to the relative increase in capital mobility if nothing else.<sup>16</sup>

If so, the main collective action problem of our age is no longer to garner diffuse consumer interests in producer-run international trade rounds to combat the protectionist excesses of democratic politics (as important as it was in the 1940s and remains today), but rather to have governments selectively exit the downward spiral of global competition and actively coordinate on the provision of public goods. In Ruggie's words, with post-war embedded liberalism gone, the monumental task of this century is 'embedding the global market within shared social values and institutional practices'.<sup>17</sup>

In sum, the WTO system is inherently protectionist and producer-driven, not consumer/citizen-focused. In order to make the system more acceptable and legitimate across broad sections of society – not just traders and producers – this must be changed. Those are foundational problems of the system that, over time, will need to be corrected. Technical assistance for developing countries on how to negotiate trade deals and outreach by the WTO Secretariat to NGOs, the focus in the Sutherland report, will not resolve these issues. It will require a paradigm shift both in the mechanics and substantive rules of the institution.

## II. COORDINATION AND COHERENCE WITH OTHER

### INTERGOVERNMENTAL ORGANIZATIONS: A STEP BACKWARDS?

Although the Sutherland report 'takes a favourable view of "horizontal coordination"' between the WTO and other intergovernmental organizations (at

<sup>15</sup> As Robert Reich, above note 12, puts it: 'The fact is, today's economy offers us a Faustian bargain: it can give consumers deals largely because it hammers workers and communities. We can blame big corporations, but we're mostly making this bargain with ourselves . . . The problem is, the choices we make in the market don't fully reflect our values as workers or citizens . . . The only way for the workers or citizens in us to trump the consumers in us is through laws and regulations that make our purchases a social choice as well as a personal one'.

<sup>16</sup> John Ruggie, 'Taking Embedded Liberalism Global, The Corporate Connection', in David Held and Matthias Koenig-Archibugi (eds), *Taming Globalization: Frontiers of Governance* (2003).

<sup>17</sup> Id.

p 39), it eventually concludes that '[t]he WTO legal system...cannot be changed from the outside by other international organizations' (at p 39) and must be 'preserved from undue external interference' (at p 79).<sup>18</sup> Whilst the Consultative Board sees the need for international rules to avoid or treat market failure (at p 34), as befits WTO insiders, the report somehow assumes that those rules must come from *within* the WTO, otherwise – if they stem from, for example, the UN or the ILO – they cannot impact WTO rights and obligations.<sup>19</sup>

This isolationist approach, setting up the WTO as a self-contained legal island, obviously ignores that WTO Members *themselves* do not live on a trade-only island and, as one and the same legal person (e.g. the United States of America), do conclude rules on non-trade concerns outside the WTO, including rules aimed at building stable markets (e.g. human rights conventions) and correcting environmental or social market failures. If the WTO is serious about coherence and coordination it must take account of this other activity and construe its own rules accordingly.<sup>20</sup> Failing to do so will only increase the legitimacy crisis of the WTO. It is disingenuous to talk of coordination and coherence when in fact one says upfront, as the Sutherland report does, that, within the WTO, WTO rules always prevail over other agreements.

The WTO insiders' view thus defended by the Consultative Board could not be further removed from the holistic 'human security' approach that pervades the recent UN High-level Panel Report focused on collective security, in particular 'the indivisibility of security, economic development and human freedom'.<sup>21</sup> In a *Foreword* to this UN High-level report, UN Secretary-General Kofi Annan summarized this genuine coordination approach as follows:

I wholly endorse the report's core argument that what is needed is a comprehensive system of collective security: one that tackles both new and old threats, and addresses the security concerns of all States – rich and poor, weak and strong. Particularly important is the report's insistence that today's threats to our security are all interconnected. We can no longer afford to see problems such as terrorism, or civil wars, or extreme poverty, in isolation. Our strategies must be

<sup>18</sup> See above note 4. When it comes to WTO dispute settlement and the role there for other international rules, the report (at p 39) concludes that the system 'offers no legal space for cooperation with other international organizations except on a case-by-case basis derived from the right of panels to seek information'.

<sup>19</sup> At p 39: 'The WTO legal system is part of the international legal system, but it is a *lex specialis*. This *lex specialis*, *qua lex specialis* cannot be changed from the outside by other international organizations that have different membership and different rules regarding the creation of rules'. This statement is in direct contradiction with Articles 30 and 48 of the Vienna Convention on the Law of Treaties addressing, respectively, the interaction between earlier and later treaties and *inter se* modifications of multilateral treaties.

<sup>20</sup> See Joost Pauwelyn, *Conflict of Norms in Public International Law, How WTO Law Relates to Other Rules of International Law* (2003).

<sup>21</sup> See above note 5 at p 1.

comprehensive. Our institutions must overcome their narrow preoccupations and learn to work across the whole range of issues, in a concerted fashion.

As much as the European Communities evolved from a system built almost exclusively on economic integration to a comprehensive regime with counterbalancing rules on the environment, social life and human rights, equally, the WTO's view of the world must and is expanding beyond merely liberalized trade. The inescapable reality is that, in a globalized economy, non-trade concerns simply cannot be separated from trade concerns. Having already restricted the ability of states to use non-trade interests as a justification for government policies that affect trade, the WTO can hardly wash its hands of the problem and walk away. Existing WTO rules impact these non-trade issues (be it efforts to protect subsistence farmers in Africa, combat climate change or save endangered sea-turtle). The WTO must participate in the messy political debate on their relationship.

Obviously, the differences between the EU and the WTO are and will always remain enormous. The economic and non-economic integration at the international level will never be as deep as that in the EU. Moreover, whilst the EU gradually assembled legislative capacity in many non-economic fields (such as the environment or food safety), at the international level, a functional division of labor between international organizations, based on state consent, is and remains desirable. Yet, the general trend of social rules supplementing what was originally a purely economic operation is the same: Although the WTO is legislatively concerned only with making trade-related treaties, and the UN and ILO are better equipped to focus, for example, on security, human rights and labor questions, each of these organizations operate, and must be seen as operating, on one and the same interconnected, though widely diverse and multi-layered, scene of international law.<sup>22</sup>

In sum, the Sutherland report merely pays lips service to the problem of coordination and coherence. In substance, it sticks to the traditional, insiders' view of WTO isolation. This foundational problem will not be resolved by observership for other organizations at WTO meetings or *amicus curiae* briefs by NGOs in WTO dispute settlement, the focal points in the Sutherland Report. Like the WTO's protectionist/producer bias, the foundational problem of coherence and coordination requires a paradigm shift both in the mechanics and substantive rules of the institution. Indeed, compared to Appellate Body case law on the question,<sup>23</sup> the Sutherland Report is a step backwards.

<sup>22</sup> See Joost Pauwelyn, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands', 25 *Michigan Journal of International Law* 903 (2004).

<sup>23</sup> See Joost Pauwelyn, 'The Role of Public International Law in the WTO: How Far Can We Go?', 95 *American Journal of International Law* (2001) 535–78.

### III. AN ALTERNATIVE DIAGNOSIS OF THE WORLD TRADE SYSTEM: THE THREAT OF A FORTRESS WTO

A superficial reading of the Sutherland Report may well lead many people to think that, besides some transparency issues, all is going perfectly well at the WTO and that the WTO's biggest threat is regional trade agreements.<sup>24</sup> Let there be no mistake: Things are far from perfect in the world of trade. Gone are the days of a cozy GATT-club. Instead, the threat of a WTO fortress is looming, both for those outside and those inside the system.

Many countries and people, in particular the poor and vulnerable, feel left behind or locked *outside* the WTO. For most developing countries, participation in the system remains elusive.<sup>25</sup> Ordinary citizens in both poor and rich countries perceive the WTO as a fortress hard to penetrate, a system that operates, behind closed doors, in the interest of powerful producers and exporters, but is oblivious of the rural poor and the plight of workers or the environment.<sup>26</sup> In this sense, the WTO suffers, first and foremost, from a lack of popular support, loyalty or input legitimacy.

Yet, at the same time, unlike the early years of GATT, this lack of input legitimacy is no longer offset by progress in actual trade liberalization or output legitimacy. The increase in participation or politics that *did* take place over the years, in particular the insistence by WTO Members on a political veto in decision-making, is currently stifling further welfare enhancing liberalization and preventing much needed reforms to make the system more equitable for developing countries and more open and supported by civil society. The deadlock in the political branch, combined with an automatic dispute process, also risks giving too much power to what many see as un-elected, faceless bureaucrats on the judicial branch.<sup>27</sup> As a result, the WTO is perceived as a fortress even by those *inside*, that is, governments and domestic polities, tied up in the straitjacket of the WTO single package, with no way out, or forward, either because of economic realities or because of the consensus rule and an ever stricter enforcement mechanism.

In sum, the WTO now lives in what one could call the worst of both worlds: It misses the benefits of popular support or politics (lack of input

<sup>24</sup> Although economists remain divided on the question of free trade deals and such deals will, for political reasons, always be around no matter what the WTO does (if only to push the conclusion of a multilateral deal or as a much preferred alternative to war), the Consultative Board opens its report with the issue (Chapter 1) and depicts it as the major threat to the WTO system.

<sup>25</sup> See, for example, *Oxfam, Rigged Rules and Double Standards: Trade, Globalization and the Fight Against Poverty* 5 (2002) ('The problem is not that international trade is inherently opposed to the needs and interests of the poor, but that the rules that govern it are rigged in favour of the rich').

<sup>26</sup> See Lori Wallach, 'The FP Interview: Lori's War', *Foreign Pol'y* (Spring 2000) 118 and K. Danaher and R. Burbach (eds), *Globalize This! The Battle Against the WTO and Corporate Rule* (2000).

<sup>27</sup> Claude Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization* 1 (2001).

legitimacy) *and* must do without the benefits of further trade liberalization and a rule of law perceived as fair and equitable for everyone (lack of output legitimacy).

#### IV. AN ALTERNATIVE FRAMEWORK FOR WTO REFORM: THE LAW-AND-POLITICS PARADIGM

As most commentators do, the Sutherland report addresses the challenges of the WTO in a bifurcated way, separating its analysis of the WTO's political branch from that of the WTO's legal-normative structure and dispute settlement. This dichotomy between politics and law is engrained in all historical narratives of the world trade system. The common wisdom is, indeed, that the world trade system evolved from a power-based (politics) to a rules-based (law) regime.<sup>28</sup> In a steady, uni-directional process of legalization, the argument goes, trade *law* has gradually replaced trade *politics*.<sup>29</sup>

Both historically and normatively, however, this *from-politics-to-law* approach is questionable. In a forthcoming article I offer an alternative *law-and-politics* paradigm, demonstrating that, throughout the trade system's evolution, law did *not* replace politics.<sup>30</sup> Rather, both the levels of law (e.g. a strengthened DSU) and politics (e.g. broader participation and contestation and a vehement defense of the consensus rule) gradually increased, in a mutually reinforcing fashion. Similar to the inverse relation between Hirschman's notions of 'exit' and 'voice'<sup>31</sup> – where closure of exit options or stricter legal discipline *increases* the demand for voice or participation in the political process<sup>32</sup> – more law in the GATT/WTO *required* more politics. In particular, faced with less exit options from the system's normative structure, WTO Members insisted on more participation and a veto in the system's decision-making process. Conversely, more politics in the GATT/WTO (e.g. the consensus rule) *enabled* and was an absolute *precondition* to make more law (e.g. a strong DSU) acceptable and digestible.

A crucial insight of this claim is that the often referred to 'institutional paradox' between the WTO's consensus-based, inefficient rule-making procedures and its highly efficient, automatic dispute settlement system is readily

<sup>28</sup> See John Jackson, 'The Crumbling Institutions of the Liberal Trade System', 12 J. World Trade L. 93, 99 (1978) and Robert Hudec, 'Review Article: Free Trade, Sovereignty, Democracy: The Future of the WTO', 1 World Trade Rev. 211, 219–20 (2002) ('The conventional history of GATT/WTO dispute settlement (for which I may be partly responsible) teaches that GATT dispute settlement evolved from a "diplomatic" instrument into a "judicial" instrument').

<sup>29</sup> See, e.g., Judith Goldstein, Miles Kahler, Robert Keohane and Anne-Marie Slaughter, 'Introduction: Legalization and World Politics', 54 International Organization 385, at 389 (referring to a victory for trade 'legalists' over trade 'pragmatists').

<sup>30</sup> Joost Pauwelyn, *The Transformation of World Trade*, 104 Mich. L. Rev. 1 (2005).

<sup>31</sup> Albert Hirschman, *Exit, Voice, and Loyalty* (1970).

<sup>32</sup> See J. H. H. Weiler, 'The Transformation of Europe', 100 Yale L.J. 2403 (1991), reprinted and updated in J. H. H. Weiler, *The Constitution of Europe* (1999), 10–101.

explained.<sup>33</sup> Rather than a paradox or puzzle, the juxtaposition of a strong, automatic dispute settlement system (high discipline, low exit) and a tedious, consensus-based rule-making process (high voice/participation) is a logical – though not necessarily optimal – phenomenon. High levels of legalization and discipline, such as a strong enforcement mechanism entail limited exit options and naturally *require* and *lead to* high demands for voice via participation and political input, such as consensus decision-making. Put differently, without the consensus rule in the political process the strong and automatic DSU would not have come about and could not be sustained. Conversely, because of a compulsory and automatic DSU, WTO Members explicitly confirmed, and continue to vehemently defend, their veto right in the political WTO process.

Notwithstanding this intimate, bi-directional interaction between the trade system's legal structure and its political mechanism, conventional proposals to reform the WTO, including the Sutherland report, do not take account of this delicate balance between law and politics. They focus rather on one side of the spectrum (e.g. getting rid of the consensus rule<sup>34</sup> or reverting to GATT-type dispute vetoes<sup>35</sup>) without weighing the countervailing effects on the other. Yet, the law-and-politics, exit-and-voice balance is in constant flux and under constant threat. A minute alteration on one side can change the balance the way pulling out one brick at one end of a building can cause major cracks on the other end, even the demise of the entire construction. A better framework for reform realizes the fluid equilibrium between law and politics, discipline and participation and the bi-directional relationship that brings it about.

Knowing that the present combination is one of high discipline (e.g. a strong and automatic DSU and single package approach) that *led to* and *requires* high levels of participation (including a strict consensus rule), further legalization (i.e. further closure of exit),<sup>36</sup> without the necessary political support, would put even more pressure on the voice mechanism and demand even higher levels of participation in an organization where such levels are already too low. It would only worsen the deadlock in the political branch (less exit requires more voice, hence makes political decisions even more

<sup>33</sup> Ignacio García Bercero, 'Functioning of the WTO System: Elements for Possible Institutional Reform', 6 *International Trade Law and Regulation* 103, 105 (2000) and Barfield, above note 27, at 1.

<sup>34</sup> See, e.g., Thomas Cottier and Satoko Takenoshita, 'The Balance of Power in WTO Decision-Making: Towards Weighted Voting in Legislative Response', 59(2) *Aussenwirtschaft* 171, 184–86 (2003).

<sup>35</sup> See Barfield, above note 27, at 7.

<sup>36</sup> See, for example, E.-U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law* (1991); John Ragosta, 'Unmasking the WTO – Access to the DSB System: Can the DSB Live Up to Its Moniker "World Trade Court"?', 31 *L. & Pol'y Int'l Bus.* 739 (2000) (calling for private party access to the DSU) and Raj Bhala, 'The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)', 33 *George Washington Int'l L. Rev.* 873 (2001) (advocating a *de jure* rule of precedent under the DSU).

difficult) and risk being counterproductive by putting pressure on some members, in particular the most powerful ones, to leave the organization. Equally, although majority-based voting in the WTO<sup>37</sup> could facilitate the decision-making process and thus, like further legalization, boost the WTO's short-term output legitimacy, the limitation in voice and participation that it would engender (through members losing their veto over new rules) risks undermining the support for, and legitimacy of, the strong dispute process and, in the long run, the trade system as a whole. In the absence of a high enough level of loyalty or support for the WTO, more – not less – voice or participation from individual WTO Members and their constituencies is needed. Finally, reverting to GATT, diplomatic-style dispute settlement, re-injecting politics into the dispute process itself,<sup>38</sup> may entangle decision-making deadlocks. Less discipline would, indeed, require less participation. Yet, this proposal neglects almost 100 years of trade history. If the inter-war period and GATT has taught us one lesson it is that for actual trade liberalization to occur, trade commitments must have legal value and be backed by a strong, independent dispute mechanism. This is all the more necessary today where most trade restrictions take the form of covert non-tariff barriers, often going to the heart of state sovereignty, for which countries would be hard-pressed to exercise a veto if they had one.

Although the Sutherland report does not fall in any of the above three traps – it does not call for major, additional legalization/constitutionalization, defends the consensus rule and rejects the proposal to revert to GATT-like vetoes – by largely preserving the *status quo* it essentially ignores the problem of the WTO's lack of input and output legitimacy and the related problem of asymmetry between the WTO's judicial and political branches.

In my view, and through the lens of exit-and-voice, law-and-politics, the trade system's legitimacy problem is best resolved through a concerted and balanced reform on both the law and politics side. In essence, the WTO needs more, not less, politics and participation of individual members and non-state actors; and more, not less, control by domestic politics and consideration of non-trade concerns (that is, *more voice or politics to sustain and enable the closure of exit or increase in WTO discipline*). Moreover, the WTO must maintain, not eliminate, the possibility for exit or safety valves especially when supported by consumer welfare or democratic decision (that is, *keep and clarify crucial exit options to enable political deals and soften the demand for voice*).

<sup>37</sup> See above note 34. Debra Steger as well has argued for more flexible decision-making rules in 'Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization', 5 JIEL 565 (2002) (reviewing Barfield, above note 27. Pascal Lamy, the former EU trade commissioner, in turn, has called the WTO's decision-making process 'medieval' (Charlotte Deny, Larry Elliott and David Munk, 'Brussels Urges Shake-up of "Medieval" WTO', *The Guardian* (16 Sept. 2003)).

<sup>38</sup> See Barfield, above note 27, at 7.

Rather than *decreasing* politics and participation – as some have suggested, for example, by getting rid of the WTO consensus rule or de-politicizing WTO affairs – I suggest *broadening* the space for political debate and contestation. For the world trade system to be legitimate and sustainable, especially with a strong normative structure, more (not less) politics are needed.<sup>39</sup> In large part because of its foundational mechanics (to overcome protectionism by insulating export-interests from domestic politics), the world trade system remains too technocratic and too isolated from popular support. To increase participation and support, the consensus rule must be maintained but the participation of individual WTO Members as well as non-state actors increased. The role consensus plays in the internal and external legitimacy of the world trade system largely compensates for the delay and *lourdeur* in WTO decision-making, as well as for the sometimes limited outcome in trade negotiations.

At the same time, to facilitate this messy voice mechanism – in particular, consensus building and the varied avenues for input from non-state actors – and to prevent deadlock in the political, decision-making process, it is important to keep certain exit options open and not to over-legalize the system. With the assurance of exit in the worst-case scenario, WTO members will more easily join a political consensus to create new rules. Crucially, limited exit options and slightly lower levels of discipline may offer important democratic safety valves and thereby respond to criticisms of a WTO constitution-type construct that imposes free trade over and above anything else. In large part because of its foundational mechanics (to overcome protectionism by insulating export-interests from domestic politics), the world trade system risks being too rigid or legalized to respond to valid flexibility demands of representative politics.

Limited exit options, when combined with the suggested high levels of participation, would eventually not often be resorted to: Given the high levels of participation in law-making and the other pressures felt through the voice mechanism (in particular from consumers and businesses that are harmed by trade restrictions), countries ought only exercise these exit options in exceptional circumstances. In the end, therefore, rather than undermine the normative structure of the WTO, limited exit or somewhat lower levels of discipline – in tandem with higher levels of participation and politics – is the best recipe for an effective and legitimate world trade system.

<sup>39</sup> See David Kennedy, 'The Forgotten Politics of International Governance', *Eur. Hum. Rts. L. Rev.* 117 (2001); Armin von Bogdandy, 'Law and Politics in the WTO, Strategies to Cope with a Deficient Relationship', in *Max Planck Yearbook of United Nations Law* 5, 609–74 (2001) and Robert Howse, 'From Politics to Technocracy – and Back Again: The Fate of the Multilateral Trading System', 96 *Am. J. Int'l L.* 94 (2002).

V. AN ASSESSMENT OF SOME OF THE SUTHERLAND REPORT  
PROPOSALS UNDER THE LAW-AND-POLITICS PARADIGM

**A. The need for more voice or politics**

Although the Sutherland Report at times questions the consensus decision-making rule and comes close to breaking it with the proposal for a 30-member senior level consultative body,<sup>40</sup> the report ultimately supports continuation of the consensus principle. Under the law-*and*-politics paradigm, this proposal makes a lot of sense. In the absence of a high enough level of loyalty or support for the WTO, more – not less – voice or participation from individual WTO Members and their constituencies is needed. Indeed, it would not be unfair to say that at this moment most layers of society have serious doubts as to the WTO project, be it because they feel left behind, such as developing countries, or because they perceive the WTO as a front for big business and dehumanizing capitalist values. As a result, as the WTO stands today, not enough loyalty exists to either replace voice *or* to keep exit at bay. In this context, without drastically reducing current levels of discipline or law and thereby weakening the system's normative structure and effectiveness, it is hard to imagine that any WTO Member could accept being outvoted based on some majority-voting rule. Whatever other forms may exist to legitimize international governance,<sup>41</sup> in the WTO none is currently strong enough to support the revolutionary shift from consensus to majority-based decision-making without seriously undermining the trade system's effectiveness, including its strong dispute process.

Other, more specific, proposals in the Sutherland report would also meet the need for political reinforcement and increased levels of contestation at the WTO, namely: more active participation of senior policy-makers in Geneva-based discussions (through annual instead of bi-annual Ministerial Conferences and a summit of world leaders at the WTO every five years),<sup>42</sup> obliging countries that plan to block a broad consensus to explain in writing why the matter is one of vital interest to them (thereby putting contestable decisions on the table for substantive discussion instead of silencing debate *a priori*)<sup>43</sup> and more outreach by the WTO Secretariat to civil society.<sup>44</sup>

In contrast, other proposals in the Sutherland report risk silencing the political debate or prematurely taking away decision-making powers from WTO

<sup>40</sup> At p 71.

<sup>41</sup> See Daniel Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 Am. J. Int'l L. 596 (1999) and Ruth Grant and Robert Keohane, *Accountability and Abuses in World Politics*, available at <http://www.poli.duke.edu/people/faculty/docs/accountability.pdf> (last visited 7 January 2005) (calling on commentators to 'think outside the democratic box' and laying out a series of accountability models based on participation and delegation).

<sup>42</sup> See Sutherland Report at 70.

<sup>43</sup> *Id.*, at 64.

<sup>44</sup> *Id.*, Chapter V.

member states. Although the report is correct that the WTO Secretariat needs to take a more proactive stance in explaining the benefits of liberalized trade and connecting with civil society, it is too early – i.e. there is not yet the required degree of loyalty or socialization of the WTO project amongst the populations of WTO Members – to confer ‘a parallel responsibility’ on the WTO Secretariat ‘as guardian of the system’ or ‘Guardian of the Treaties . . . to act in the common interests of the Members’.<sup>45</sup> Put differently, and there is no doubt that this is the analogy that the Consultative Board had in mind, it would be premature to convert the intergovernmental WTO Secretariat into a supranational EU-Commission type construct with independent powers and heavy handed steering by a Jacques Delors type WTO Director-General.<sup>46</sup>

Finally, unlike the impression created by the Sutherland report – which focuses on observership in WTO meetings, *amicus curiae* and WTO-organized seminars – increased voice or participation by non-state actors, such as NGOs, small businesses, the rural poor and citizens at large, ought not focus so much on having a seat or microphone in WTO meetings,<sup>47</sup> nor does it require any explicit approval by WTO Members. Given that the WTO matters and is for real (exit from it has been significantly reduced), state and non-state actors alike *are* using the voice mechanism and injecting politics in the debates, whether the WTO as an organization or its individual members like it or not. In fact, rather than NGOs and citizens needing the help or blessing of the WTO (e.g. through formal permission to attend WTO meetings), it is the WTO that needs the input and support of NGOs and citizens to implement and legitimize its activities.<sup>48</sup> Crucially, the sounding board of NGOs is not limited to, or even most important in, Geneva. Although NGOs have an important lobbying and information role to play at the WTO itself (adding social and expert legitimacy to the organization), their activity is even more crucial at the grass-roots level. They constitute a direct, transnational interface or voice mechanism where citizens and consumers can transmit concerns and obtain information about WTO activities and decisions. To enable and foster these diverse forms of participation, contestation and dissemination, the WTO itself must – as the Sutherland report acknowledges – improve the transparency of its activities, including its dispute settlement process. To bring the WTO closer to the public, the creation of regional WTO offices

<sup>45</sup> *Id.*, at 73.

<sup>46</sup> At p 77, the report notes: ‘The WTO needs a convincing and persistent institutional voice of its own’. On pp 76–77 it laments that ‘[a] Member-driven organization is a valuable concept...In recent years [however], the impression has often been given of a vehicle with a proliferation of back-seat drivers, each seeking a different destination, with no map and no intention of asking the way’.

<sup>47</sup> See, e.g., Daniel Esty, ‘Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition, or Exclusion’, 1 *JIEL* (1998) 123; Gabrielle Marceau and Peter N. Pedersen, ‘Is the WTO Open and Transparent?’, 33 *J. World Trade* (1999) 5.

<sup>48</sup> See Harold Koh, ‘Transnational Public Law Litigation’, 100 *Yale L.J.* 2347 (1990); Steve Charnovitz, ‘WTO Cosmopolitics’, 34 *N.Y.U. J. Int’l L. & Pol.* 299 (2002).

must be considered. In addition, thought could be given to setting up a WTO inspection mechanism similar to that available in the World Bank and regional development banks.<sup>49</sup>

## B. The need to keep exit options open

Various proposals in the Sutherland report realize the importance of keeping exit options from the WTO open. The report somewhat reluctantly accepts the need for a multiple-speed or variable geometry WTO.<sup>50</sup> The WTO should, indeed, relinquish its obsession with the single package idea. Given the huge diversity among WTO Members, both in terms of economic development and non-economic preferences, WTO agreements and rules ought not always be binding on all WTO Members. With close to 150 members, differentiation or a multiple-speed WTO is unavoidable. Rather than force new commitments on unwilling countries through majority voting or block the entire process by insisting on consensus amongst all players, the system must recognize its diversity and tailor-make its rules to its different constituencies. As the Sutherland report points out (at p 65), the need for consensus amongst all WTO Members to add a plurilateral agreement to the WTO treaty, even if such agreement is binding only on some WTO Members, must be revisited. Even within the EU, with its far more homogeneous membership, this strict requirement for differentiation no longer applies.<sup>51</sup> Although some control by the entire WTO membership over new agreements is useful (e.g. to make sure that plurilateral agreements do not harm the rights of third parties), a single member ought not have a veto to block further WTO progress by others.

On other occasions, however, the Sutherland report neglects the importance of exit options and seems to aim at a one-size-fits-all WTO straitjacket. In contrast to its openness to a multiple speed WTO, the report – somewhat contradictory – is vehemently opposed to regional trade deals and, as pointed out earlier, refuses to give substantive weight to agreements concluded by WTO Members themselves *outside* the confines of the WTO institution.

The Consultative Board also advocates a strong, legalist position on the binding nature of WTO dispute settlement reports and expresses major reservations about the alternative WTO remedy of compensation.<sup>52</sup> Although technically speaking this author agrees that dispute settlement reports are legally binding under international law, the Sutherland report thereby risks

<sup>49</sup> See World Bank Inspection Panel, *Accountability at the World Bank: The Inspection Panel 10 Years On* (2004). A similar system for the WTO could increase its accountability in that it permits affected groups and individuals to challenge the substance of official WTO activities – such as technical cooperation – under the guidelines and rules of the WTO itself.

<sup>50</sup> At pp 65–66.

<sup>51</sup> See Bruno de Witte *et al.* (eds), *The Many Faces of Differentiation in EU Law* (2001).

<sup>52</sup> Both discussed at p 54.

overlooking why remedies in the WTO are relatively weak and downplays the usefulness, both political and economic, of alternatives to immediate, full compliance in each and every case.

Indeed, my claim is that weak remedies in the WTO were a crucial pre-condition for the otherwise strengthened WTO dispute process. Knowing that they could no longer block dispute rulings, WTO Members were eager to limit the remedies or sanctions that would follow any WTO condemnation. To drastically reduce or eliminate those exit options – that is, to further legalize the WTO without countervailing increases in participation, loyalty and support for the WTO project – risks undermining both the substantive commitment to the WTO and to the DSU in particular. Given the uncertainties of the future, both political and economic, negotiators *needed* certain exit options as safety valves (including tariff re-negotiations, safeguards, broad substantive exceptions and the possibility to settle disputes or temporarily pay compensation or suffer retaliation).<sup>53</sup> Rather than birth defects that must be cured as soon as possible through ever more legalization, my claim is that those exit options were, and remain, crucial pre-conditions for trade deals to stick. Without them, the breadth and depth of substantive WTO commitments would not have materialized. Equally, given that WTO obligations are not collective obligations binding *erga omnes partes*<sup>54</sup> settlements and non-WTO treaties in deviation of WTO rules in other international organizations must be accepted as permissible exit strategies – where non-economic concerns complement trade liberalization – for as long as they do not affect the rights of third parties.

At the same time, WTO contingency measures – safeguards, anti-dumping and countervailing duties to offset subsidies – focus exclusively on harm to competing *producers*. As much as, in the early days of GATT, those safety valves were needed to attract and maintain *producer* support, a WTO genuinely transformed into a consumer-driven organization must have sufficient safety valves to attract and maintain *consumer* support.<sup>55</sup>

Finally, the Sutherland report's unabated defense of the current WTO dispute settlement system neglects the threat of an over-reaching, automatic WTO judiciary in the context of a political process that is run and continues

<sup>53</sup> See Peter Rosendorff and Helen Milner, 'The Optimal Design of International Trade Institutions: Uncertainty and Escape', 55 *Int'l Org.* 829 (2001); Richard Bilder, *Managing the Risks of International Agreement* (1981), at 219–21 (referring to exit options in treaties as 'risk-management techniques').

<sup>54</sup> See Joost Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?', 14 *Eur. J. Int'l L.* 907 (2003).

<sup>55</sup> For an example of such alternative safeguard mechanism, linked to compulsory compensation, see Pascal Lamy, *The Emergence of Collective Preferences in International Trade: Implications for Regulating Globalization* (2004), at [http://europa.eu.int/comm/trade/issues/global/csd/conf\\_en.htm](http://europa.eu.int/comm/trade/issues/global/csd/conf_en.htm). See also Patrick Messerlin, 'Antidumping and Safeguards', in Jeffrey Schott (ed), *The WTO After Seattle*, *Institute for International Economics* (2000); Heinz Hauser and Alexander Roitinger, *New Concepts for Dispute Settlement Implementation* (2004) (unpublished manuscript, on file with the author, suggesting the replacement of anti-dumping and safeguards with one safeguard mechanism that can be invoked for any reason, not just injury to the domestic industry, but coupled with an obligation to pay compensation).

to require consensus decision-making. It is pure wishful thinking for the Sutherland report to say (at p 55) that

the Doha Round, it is to be profoundly hoped, will eventually correct the imbalance between law-making and any tendency toward creative law enforcement through the dispute settlement system.

The imbalance between the WTO judiciary and its political branch is here to stay, at least for the foreseeable future. It is simply unrealistic to expect that in the Doha Round a WTO of 150 members would somehow provide more specific and less ambiguous rules than the smaller and less diverse crowd of Uruguay Round negotiators did in 1994. If anything, new WTO agreements are destined to be even more vague than before.

Given the need to maintain the consensus rule – at least until levels of socialization and support for the WTO project have matured – there is an absolute need for WTO panels and the Appellate Body to be warned against judicial activism, of the type the early European Court of Justice engaged in.<sup>56</sup> WTO dispute settlement is and needs to be politically sensitive.<sup>57</sup> Sufficient membership control must be maintained and quality checks on the personnel active in dispute settlement increased.<sup>58</sup> Effective use must be made of common judicial techniques that translate political sensitivities into legal results (such as deference, judicial minimalism, putting the burden of proving an obligation on the complainant and even declaring a *non liquet*).<sup>59</sup> Reverting to GATT-type vetoes would, as the Sutherland report points out (at p 56), be ‘a regression’. However, legislative correction of the Appellate Body can take forms other than formal

<sup>56</sup> To be sure, I do not regard the reference by WTO panels and the Appellate Body to non-WTO agreements *binding on the disputing parties* as judicial activism. Such reference is consistent with international law principles (in particular the Vienna Convention on the Law of Treaties) and does not add or diminish anything that WTO Members did not agree to themselves.

<sup>57</sup> See Richard Steinberg, ‘Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints’, 98 Am. J. Int’l. L. 247 (2004) and James McCall Smith, ‘WTO Dispute Settlement: The Politics of Procedure in Appellate Body Rulings’, 2 World Trade Rev. 64, 75 (2003) (‘courts will act with restraint, cognizant of their political context and perceived legitimacy...Appellate Body members are...eager to avoid adverse political responses by WTO member states.’).

<sup>58</sup> Including the appointment *and* reappointment of Appellate Body members by consensus of all WTO Members (DSU art. 17.2); the *de facto* reservation of a US, EC and Japanese seat on the Appellate Body with the other four seats rotating on a geographical basis; and the practice that even nationals of a disputing party can sit on an Appellate Body division.

<sup>59</sup> See Hudec, above note 28, at 215, 219 (‘Courts do have legal tools that permit them to deflect pressures to legislate...the best option at the present time would be to continue dealing with the problem cases as they come, under the present DSU rules, subject to whatever technical improvements governments may agree to.’); William J. Davey, ‘Has the WTO Dispute Settlement System Exceeded Its Authority?’, 4 JIEL (2002) 79; Lorand Bartels, ‘The Separation of Powers in the WTO: How to Avoid Judicial Activism’, 53 ICLQ (2004) 861, 865; Jeffrey Dunoff, ‘The Death of the Trade Regime’, 10 Eur. J. Int’l L. (1999) 756; J. Patrick Kelly, ‘Judicial Activism at the WTO: Developing Principles of Self-Restraint’, 22 NW J. Int’l L. & Bus. (2002) 353; see generally, Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

veto of Appellate Body rulings.<sup>60</sup> In particular, the political control that the DSB currently exercises over dispute settlement ought not to be underestimated. As the umbilical cord between the political and judicial branch, it is a crucial interface and forum of contestation or voice to which both panels and the Appellate Body are most receptive. The outcry in the DSB against the Appellate Body's acceptance of *amicus curiae* briefs in the *EC – Asbestos* dispute offers a good example.<sup>61</sup> Ever since, the Appellate Body has not drawn information from such briefs (even if they were formally accepted) and a number of panels even refused outright to accept *amicus* briefs.<sup>62</sup> Finally, authoritative interpretations correcting dispute rulings remain a possibility and, at least on the books, require a mere three-quarters majority.<sup>63</sup> As elaborated above, resisting the temptation of ever more legalization (including the temptation of judicial activism and a strict rule of precedent), and maintaining crucial exit options (such as meaningful escape clauses and relatively weak remedies) would take some steam off the judicial branch. This, in turn, should facilitate political consensus building and legislative correction, and could even make three-quarters majority interpretations digestible. Equally, more participation and contestation in WTO affairs, as suggested earlier (more politics), should help avoid overreaching by the Appellate Body and lay a broader basis of support for its rulings.

<sup>60</sup> See Tom Ginsberg, *International Judicial Lawmaking* (2005), unpublished manuscript on file with author ('While formal mechanisms to over-rule international judges are relatively difficult to exercise, states have at their disposal various informal mechanisms to communicate their views to judges').

<sup>61</sup> General Council, *Minutes of Meeting*, WT/GC//60, 22 November 2000.

<sup>62</sup> See, Panel Report on *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber From Canada*, WT/DS257/R, adopted 17 February 2004, footnote 75 and *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, adopted 26 April 2005, footnote 75.

<sup>63</sup> WTO Agreement, Art. IX:2.